

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

UNITED STATES OF AMERICA : Criminal Action No.

v. : PJM 03-457

JAMES FLOOD, : Greenbelt, Maryland

Defendant. : Thursday, July 27, 2017

/ 10:00 A.M.

TRANSCRIPT OF MOTION PROCEEDINGS
BEFORE THE HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES

P-R-O-C-E-E-D-I-N-G-S

THE DEPUTY CLERK: The matter now pending before the Court is Criminal Case Number PJM 03-457, United States of America versus James Edward Flood, III. The matter comes before this Court for a motions hearing.

THE COURT: All right. Counsel, identify yourselves first for the government and then for defendant.

MS. WILKINSON: Good morning, Judge Messitte. Sandra Wilkinson on behalf of the U.S. Attorney's office.

MS. KAHN: Good morning, Your Honor. Marta Kahn for Mr. Flood.

THE COURT: Anything preliminary from either government or defendant?

MS. WILKINSON: I don't believe so.

THE COURT: You're ready to launch?

Here's what I thought. Because there is a number of issues, we should go back and forth on the issues rather than having the defendant argue all of his claims and then hear it from defendant. Let's just go one, two, three, four, back and forth.

And I don't know whether you want to go in the numerical sequence of the counts or you've got certain kinds of issues you want to cluster and talk about before others.

Ms. Kahn, it's your motion.

MS. KAHN: Certainly I'll accommodate whatever the

1 Court wants to do. I was going to submit on a couple of the
2 issues.

3 THE COURT: Well, why don't we start with what isn't
4 an issue then? I know one, of course, we've decided already,
5 which is the juror strikes.

6 MS. KAHN: Yes.

7 THE COURT: Okay.

8 MS. KAHN: I'm going to argue Claim One, which is on
9 the plea, the ineffective assistance in failing to seek a plea.

10 I'm going to submit -- I'm sorry, didn't write the
11 numbers of the claims on my notes. I'm going to submit on
12 Claims Two and Three. And I'm going to argue more briefly than
13 Claim One, the balance of the claims obviously not including
14 *Batson*.

15 And it was my understanding the Court was no planning
16 to hear argument on the supplemental briefs on the *Johnson*
17 issues. I can touch on those briefly if the Court would like.

18 MS. WILKINSON: We haven't briefed them yet.

19 THE COURT: No, I think we -- that's right, I think
20 we'll hold off on that.

21 Well, is it fair to say that your big ticket item is
22 Claim One?

23 MS. KAHN: Yes, Your Honor.

24 THE COURT: Well, maybe we ought to get the smaller
25 issues out of the way first and then come back and spend our

1 time on Claim One. So why don't we start with -- you're talking
2 about Claim Two, which is what, fail to move for joinder.

3 MS. KAHN: I'm submitting on claims --

4 THE COURT: Oh, you're submitting. I'm sorry,
5 which -- two and three you're submitting on and --

6 MS. WILKINSON: Four was already resolved.

7 THE COURT: All right. The multiplicitous indictment
8 you're submitting on. And Claim Four is already decided. So
9 you are here on failure to offer evidence of good character,
10 conceding the sufficiency of evidence to support a finding of
11 guilt, failing to request limiting instruction regarding the
12 cross-examination of Natasha Massey, and then the collective
13 undermining of competence.

14 MS. KAHN: Yes, Your Honor.

15 THE COURT: All right. Let's lay Claim One aside and
16 go through the other ones then in sequence starting with the
17 claim as to failure to offer evidence of good character.

18 MS. KAHN: May I argue from the podium?

19 THE COURT: However you want to talk, that's fine.

20 MS. KAHN: Thank you.

21 So this is sort of a cluster of claims about defense
22 counsel strategy at trial. It's a standard Sixth Amendment
23 claim, *Strickland* claim. The first being that in opening
24 argument the defense promised that the jury would hear evidence
25 that Mr. Flood was innocent. It said, you know, the government

1 will show this and we will show that Mr. Flood was not there.
2 He is absolutely innocent and then they did not offer that
3 evidence.

4 Now, when they said that they were going to show this
5 affirmative evidence of innocence, the government objected to
6 that and the Court actually sustained that objection, and
7 actually admonished counsel that they should not say that they
8 are offering evidence of innocence unless they actually have
9 evidence of innocence. And in fact said, quote, you're going to
10 have to deliver on what you said, and they did not say that.

11 And the cases cited in the petition talk about how
12 damaging it is to offer the jury something like evidence of
13 innocence and then not provide it. In a sense that you could
14 think about it like a -- I was thinking analogies, but a toddler
15 who is offered a piece of cake and then does not receive that
16 piece of cake is going to feel much differently than if he was
17 never offered that in the first place.

18 So here is counsel saying, I'm going to show you this
19 man is innocent, and then here comes the end of trial and they
20 never heard that. There's really only one conclusion they can
21 draw from that. You said you have evidence, you don't have
22 evidence. He's clearly guilty, defense counsel essentially told
23 me that.

24 THE COURT: Was the government permitted to argue he
25 didn't provide evidence of his innocence, therefore that

1 demonstrates guilt? They wouldn't have argued that.

2 MS. KAHN: I don't believe they argued that, Your
3 Honor. I'm merely talking about what message was left by
4 defense counsel, you know, with the jury having been told that
5 they were going to receive this evidence knowing that they were
6 not going to offer that evidence is ineffective assistance.

7 If you want to simply say that the government's
8 evidence does not add up, if you want to say that it's
9 circumstantial, that they're not going to be able to actually
10 place him in the car, you can say that and then that will follow
11 through trial and through your strategy and through what the
12 evidence is actually going to show.

13 To stand there and say to a jury, I'm going to show
14 you that he's innocent and then not show that leaves the jury in
15 a more conviction prone place than they otherwise would have
16 been. I mean, I see it --

17 What the government did point to, I believe, is that
18 the -- they had, they had showed -- the government had evidence
19 that Mr. Flood's phone was used and that his car was used in the
20 event.

21 THE COURT: What are the exact words that you're going
22 on? For example, someone could say, the evidence will show that
23 he's innocent. That wouldn't be counsel necessarily
24 misrepresenting it. That would be challenging the government's
25 case. Does he say, I will show you -- we will put on evidence

1 that he's innocent or is there something that's a little more
2 neutral?

3 MS. KAHN: I have to -- if I may glance at my --

4 THE COURT: Read to me the language that you say is
5 the promise that wasn't fulfilled.

6 MS. WILKINSON: I think it's at page 18.

7 MS. KAHN: Oh, thank you.

8 "James Flood was not present at the kidnapping, had no
9 part in it and James Flood had no part in the death of Eric
10 Hayes. That's also what the evidence is going to show."

11 THE COURT: Well, what's wrong about that?

12 MS. KAHN: Well, I could -- the petition also points
13 out what the government and the Court thought was wrong with
14 that. And the Court itself said --

15 THE COURT: At that point or later on.

16 MS. KAHN: At that point.

17 THE COURT: This is at a bench conference, I assume.

18 MS. KAHN: Yes, Your Honor.

19 THE COURT: Okay.

20 MS. KAHN: I apologize. The government objected and
21 said, "If counsel is going to proceed with his defense as he
22 argued --

23 THE COURT: If counsel is going to proceed with the
24 defense is what the government said.

25 MS. KAHN: Correct.

1 THE COURT: All right.

2 MS. KAHN: However -- "he's going to have to call
3 Mr. Flood to say he wasn't there. So certainly, if Mr. Flood is
4 going to say he didn't do it, then that's going to have to come
5 from Mr. Flood. The only way he can prove that he wasn't there,
6 that they had his car and keys, but he wasn't there is for
7 Mr. Flood to get on the stand and say it."

8 And Your Honor said, "I'm afraid that's right. I
9 don't know how you argue he didn't do it. It's a very different
10 proposition to say that the government hasn't proved it, but to
11 say he didn't do it, no one has established that he didn't do
12 it."

13 So I think that's a fairly --

14 THE COURT: This is at the beginning of the trial or
15 end of the trial?

16 MS. KAHN: This is at the beginning of the trial.

17 THE COURT: I don't know what the evidence necessarily
18 is going to be at that point, right?

19 MS. KAHN: Well, I think counsel has a good
20 understanding of what the evidence is going to be and they
21 certainly know what evidence of innocence they possess. I think
22 they can be fairly certain the government is not going to put on
23 evidence of Mr. Flood's innocence. So when they say, the
24 evidence is going to show he is innocent, the jury is thinking
25 they're going to be hearing something reflecting that he's

1 innocent. As opposed to the government's evidence is not going
2 to amount to proof beyond a reasonable doubt or this is a
3 circumstantial case and they can't prove that he was there,
4 making a statement that --

5 THE COURT: Was there any direct proof that he was
6 there, that he was the trigger man, that he did anything like
7 that. There's a lot of circumstantial evidence around him being
8 very near the scene at the time, but wouldn't that have
9 permitted an argument that he wasn't there?

10 MS. KAHN: I certainly think --

11 THE COURT: There's no evidence that he was directly
12 there and I think Ms. Wilkinson is correctly on it, I think
13 that's what the evidence was, right?

14 Did anybody place him squarely at the scene or on the
15 scent when the shooting occurred? I don't think so.

16 MS. WILKINSON: No, we didn't have a cooperator that
17 testified about actually what happened.

18 THE COURT: So, why couldn't they argue from that,
19 we'll show that he was innocent. And then the next step would
20 be, because the evidence doesn't show that anybody put him
21 there.

22 MS. KAHN: My argument is based on partly --

23 THE COURT: He's already said, the evidence will show,
24 not we'll show.

25 MS. KAHN: Yes.

1 THE COURT: May be an important distinction.

2 MS. KAHN: I think -- my position simply reflects what
3 the government was arguing and what the Court was agreeing with
4 the government on that there's a big distinction from saying
5 that the evidence will not show that he was there, and implying
6 to the jury they have -- they didn't say the word "alibi", but
7 something implying --

8 THE COURT: Well, wait a minute though. He wasn't --
9 the jury wasn't told to disregard what he said, was it?

10 MS. KAHN: No, Your Honor.

11 THE COURT: I mean, we stopped him at that point and
12 said, don't go any further unless you're -- I mean, we're
13 effectively trying to keep him from being ineffective, aren't
14 we, at that point?

15 MS. KAHN: I believe it was at the conclusion of
16 argument that the objection occurred. However, that to me -- I
17 mean, the claim is, the cat was out of the bag at that point.
18 The jury had heard and could certainly have implied from these
19 words that we're going to hear affirmative evidence of innocence
20 and then simply did not. And that's the prejudicial ineffective
21 assistance.

22 THE COURT: That's a big leap to make that statement
23 from what the word said or said, and saying we're going to hear
24 evidence from the defendant that, and then counsel didn't follow
25 up. I'm not sure I make that connection.

1 MS. KAHN: Well, I can see that Your Honor disagrees
2 with the claim.

3 THE COURT: Well, I'm not puzzled by it because he
4 wasn't -- the jury was not told to disregard what he said and
5 what he said was permissible to that point. I didn't know what
6 the evidence was going to show at that point. I hadn't talked
7 to all the witnesses. As far as I was concerned, somebody might
8 say, you know what, I just can't see Flood connected with the
9 shooting here.

10 MS. KAHN: Well, the point that the Court and the
11 government made at the time was, if you're going to make a claim
12 of innocence as opposed to a claim that the government can't
13 meet its burden, if you're going to make affirmative claim of
14 innocence, we're expecting that you must be putting Mr. Flood on
15 the stand. So, that's what the government thought. That's what
16 the Court thought. So that I don't see that it's a massively --

17 THE COURT: I thought that was the direction he was
18 going in. I think that was -- that's the distinction. I didn't
19 think he had said it in that statement that he had made to that
20 point.

21 I didn't know the government's evidence at that point
22 and I was cautioning him, unless you're prepared to -- if
23 there's somebody who is going to demonstrate innocence except
24 you, you better be careful about being ineffective. I mean,
25 that's effectively what I would say.

1 MS. KAHN: I agree and I believe the ineffectiveness
2 had already happened at that point. So, that's the balance of
3 that claim. I mean, I just think that the jury was set up to
4 understand that there was going to be affirmative evidence of
5 innocence. I think that they could easily have made that leap.
6 The government did, the Court did.

7 I mean, it's a fairly common distinction that's made
8 between arguing affirmative innocence and arguing failure of the
9 government's burden.

10 THE COURT: So any time an attorney says, a defense
11 attorney in opening statement, my client is innocent and then
12 doesn't call a witness to demonstrate it, they're ineffective
13 for constitutional reasons.

14 MS. KAHN: I think if they -- I think these words
15 actually said, the evidence is going to show that he's innocent,
16 which in my reading of it, if I were a juror, I would think I am
17 going to be hearing evidence of his innocence, rather than the
18 government is going to fail at its burden?

19 THE COURT: Okay.

20 MS. KAHN: Should I just --

21 THE COURT: There's another part in that same motion.
22 There was an issue of character testimony.

23 MS. KAHN: Yes. By the same token, counsel offered
24 the jury that they would be hearing that Mr. Flood was a good
25 man, he had been working hard. You know, that he -- I don't

1 think they directly said that he was -- had no record, but the
2 good character evidence that they were going to put on, again
3 that evidence did not arrive. So again, the jury would not have
4 thought, you know, that Mr. Flood's character was even an issue
5 until counsel told them that evidence was coming and then it
6 didn't come.

7 Well, you said that. Where is it? What happened?
8 Maybe he's not such a good guy. Maybe we can't believe anything
9 you say, because you told us in opening you're showing us he's
10 innocent, evidence of his innocence. You didn't. You're saying
11 you're going to show us he's a good guy. Never heard anything
12 about that either. So, you know, you're --

13 Then it kind of ties in with the other claim here, if
14 I may, sort of, just touch on that one, which is ineffective
15 assistance for conceding evidence without making it a part of a
16 larger theory.

17 So, as we just discussed a minute ago, the government
18 had evidence that the perpetrators had used Mr. Flood's phone
19 and that he had -- they had used his car and he had lied to the
20 Grand Jury about the whereabouts of the car. So, basically,
21 defense counsel in opening conceded those pieces of evidence,
22 which is probably enough for a conspiracy conviction. And
23 conceding guilt is a very sticky wicket.

24 THE COURT: What does he say specifically? You're
25 characterizing what he said, but what does he say about those --

1 MS. KAHN: He says -- so there's a couple of excerpts
2 here. James Flood is seated at that table right there. The
3 defense --

4 THE COURT: Slow down a bit for the reporter.

5 MS. KAHN: I'm so sorry. I do that often, sorry.

6 "James Flood is seated at that table right there, the
7 defense table because they used his car and they used his phone
8 during the commission of that crime. What the government told
9 you is absolutely correct, they used his car. It was a car he
10 had bought off Kenneth Lighty. So in that sense, they're
11 correct.

12 I'm going to save you some time. The car was his. He
13 had purchased that car from Kenneth Lighty just days before this
14 crime took place, but that vehicle was his, no two ways about
15 it. And the government is absolutely correct, he lied about the
16 car being his before the Grand Jury. He lied about it several
17 times and we're not trying to controvert that. It was his car,
18 no doubt about it.

19 When the government called him as their witness, he
20 lied before the Grand Jury. He repeatedly lied before the Grand
21 Jury. That much is absolutely true."

22 THE COURT: This is opening or closing? I'm sorry.

23 MS. KAHN: This is opening.

24 And then they conceded the same evidence repeatedly in
25 closing as well.

1 THE COURT: All right.

2 MS. KAHN: So in certain cases, the government -- I
3 mean, in certain cases counsel can concede guilt if it's part of
4 a larger strategy. For example, if it's conceding a lower
5 offense in order to attack a greater offense, that -- generally,
6 concessions of that nature need permission of the client, but
7 more importantly, it has to be tied in to a larger strategy.

8 Here, these concessions were not tied into to a part
9 of a larger strategy. Counsel basically said, yes, that he lied
10 about the car. But it's sort of implying, I guess, that somehow
11 Lighty and Wilson got his phone in his car, but they never
12 really offered any way that Lighty and Wilson got his phone in
13 his car and used them without his permission.

14 So, again, in that sense, that's sort of giving the
15 jury enough to probably to convict on a conspiracy conviction
16 without any benefit to overall defense theory. So I just think
17 as part of a setting off the whole tone of the trial from the
18 beginning, basically, saying the government has got this great
19 evidence which is enough for you to convict, which they didn't
20 say, I grant you. And we're going to show evidence of innocence
21 and we're going to show you evidence he's a great guy. And if
22 that never happened either, this jury basically had no path to
23 deviate from conviction at that point given what defense counsel
24 had said.

25 THE COURT: You're talking about evidence that he was

1 great guy. That's really not the shape the character evidence
2 would take, is it?

3 MS. KAHN: Well, that was shorthand.

4 THE COURT: Best it's pretty broad. I mean, in terms
5 of what could have been said by a character witness.

6 MS. KAHN: I believe that the -- if -- I'm sorry, Your
7 Honor. The evidence was -- I believe it was that he --

8 THE COURT: Think about what good character would
9 mean. If he would testify, good character would bolster his
10 credibility. Good character evidence, what would it do in this
11 case? Show not to have assaultive propensity or what, what
12 would it have done?

13 MS. KAHN: I don't believe that the absence of the
14 evidence was the prejudicial ineffectiveness. I believe that
15 the promising of evidence that you then do not provide is the
16 ineffectiveness, because you lose credibility with the jury and
17 because it, again, sort of like the piece of cake analogy puts
18 it on the jury's mind that this evidence is coming. We're going
19 to hear something good about him, that he had this job or that
20 he was a contributing member of society. And then it doesn't
21 come, which makes us think either that evidence doesn't exist or
22 it makes us think you don't know what you're doing.

23 So how are we supposed to buy your defense theory that
24 somehow Flood got his phone and his car, and we never heard any
25 evidence of innocence like you said. So it just seems like that

1 unfulfilled promise contributed to the lack of credibility to
2 the defense as a whole.

3 THE COURT: Okay. Let me hear from Ms. Wilkinson on
4 these issues and then we'll let you pick up on others.

5 MS. WILKINSON: Certainly, Your Honor. Let me deal
6 with the second issue first, if I might, since it's fresh in
7 everyone's mind. I don't know how many opening statements I've
8 heard in my time here as an Assistant U.S. Attorney, but I
9 honestly can't recall a single one where defense counsel didn't
10 try to or did successfully -- I'll use the word "sneak" in
11 evidence about a person's background with no evidence submitted
12 at trial as a result of that person.

13 In other words, you're giving background about the
14 person, discussing the person before opening statements and then
15 maybe we don't hear evidence that they actually worked at so and
16 so job or that they were a good mother, or that they cared about
17 something.

18 And you know, whether or not that's a strategic
19 decision to kind of get those thoughts in front of the jury and
20 then modifying their strategy later, I don't know, but that's
21 what Mr. Lawlor did in this case because he put in his affidavit
22 that it was upon learning that the government would
23 cross-examine any character witnesses with other bad act
24 evidence that he modified his strategy accordingly with regard
25 to whether or not Mr. Flood was a honest man, a non-violent man,

1 that sort of thing and he puts that right into his affidavit.

2 THE COURT: Do we have an affidavit from the person
3 who would have given the testimony saying I would have said all
4 these things or are we speculating that that person, whoever
5 that person might have been might have said something.

6 MS. WILKINSON: Not only are we speculating about
7 that, because that is not anywhere in the petition that was
8 filed, Your Honor. But more importantly, where is the prejudice
9 in the compelling evidence that was presented before this jury
10 of Mr. Flood's involvement in this conspiracy to murder
11 Mr. Davis. How, how -- I mean, Mr. Hayes, excuse me, Your
12 Honor.

13 How did that possibly prejudice the jury if they would
14 have heard that Mr. Flood worked at Douglas Knolls apartment?
15 How would that possibly have changed in this jury's mind whether
16 or not he was involved in this particular homicide? So, there's
17 no prejudice either, there's no proof that there were people who
18 would come in and testify about what his, quote-unquote, good
19 character one. And then we have the attorney himself saying he
20 made a strategic decision at that point.

21 And let me go directly to what his affidavit actually
22 says here, Your Honor, at paragraph 5-D. "Our failure to
23 deliver evidence promised in opening, assuming opening can be
24 read as such, was based on rulings made by the Court during
25 trial.

1 At some point, I recall the government indicated they
2 possessed evidence of other criminal activity by Mr. Flood that
3 was prepared to present and we altered our strategy accordingly.

4 THE COURT: Under by way of cross-examination,
5 assuming a character witness had been called, the government
6 could have said, but have you heard that Mr. So and So also is
7 guilty of this crime, this crime and that crime.

8 MS. WILKINSON: Of course.

9 THE COURT: Where there could have been impeachment,
10 serious impeachment of the character witness that would have
11 undercut the defendant's case.

12 MS. WILKINSON: Yes, I certainly don't --

13 THE COURT: I just don't have anything before me on
14 that.

15 MS. WILKINSON: There's no evidence from the
16 petitioner in front of you before that, Your Honor, but even
17 more importantly, again, this is a defense attorney who is
18 making decisions the best he can in a context of a case where
19 there's, frankly, overwhelming evidence of Mr. Flood's guilt and
20 he is providing a little bit of background in his opening
21 statement.

22 This isn't one where he, you know, presents or
23 promises an alibi defense, for example, and then doesn't
24 deliver. And I think that that was running into the second
25 issue or the first issue that Ms. Kahn addressed. That's

1 exactly what the Court is talking about here.

2 He didn't cross that line. He's simply saying, the
3 evidence is going to show that Mr. Flood is innocent. Well, you
4 can certainly argue that from his cross-examination of the
5 witnesses because we didn't have a witness that put Mr. Flood at
6 the scene of the murder at the time that it happened. Of
7 course, you're going to argue that.

8 Did the circumstantial evidence add up to what the
9 jury convicted Mr. Flood of? Of course it did, but he had to
10 deal with the cards that he had at this point. And he is going
11 to argue from that evidence that there's nobody who said
12 Mr. Flood was sitting in that car at the time Mr. Hayes was
13 murdered.

14 And so when he's standing up before the jury, he's
15 making the point that the Court. Did that -- did he say it in a
16 --

17 You know, we're talking about semantics here. He's
18 basically saying, when you look at his opening statement and
19 we're mincing out words here, his context was, it's not enough
20 evidence and, therefore, it's going to show that he's innocent.

21 The lay person know the difference between the
22 government being able to prove and actually staying with
23 innocent, it cannot be that a defense attorney can't say that in
24 opening statement, my client didn't do this. Is that the same
25 as saying, the government can prove my client didn't do this? I

1 think we're mincing words here for purposes of what is a opening
2 statement. He certainly didn't argue that enclosing statements
3 that he was -- that there was evidence that he had put on of his
4 absolute innocence.

5 I mean, I -- you know, I read Mr. Lawlor's opening
6 statement here, Your Honor, and even though the government and
7 the Court and the defense engaged in a colloquy at the end of
8 his statement saying, hey, don't cross that line here, it really
9 was directed towards future -- making future arguments of things
10 that didn't exist. Then saying what he had said in opening
11 statement was inappropriate or more importantly ineffective for
12 purposes of this case.

13 And on that, unless the Court has any questions --

14 THE COURT: No. Ms. Kahn, do you want to respond to
15 this particular issue?

16 MS. KAHN: Just very briefly, Your Honor.

17 THE COURT: Go ahead.

18 MS. KAHN: Just three quick points. The good
19 character evidence portion of what he said was "Now, during this
20 trial, you're also going to hear about some of the good aspects
21 of James Flood, the real James Flood. And you're going to hear
22 that around January, 2002, a long time before and a long time
23 after he was a hard working young man, worked every day, worked
24 every day for the Douglas Knolls apartments. He worked every
25 day and you're going to hear from people who know all aspects of

1 his life. And they're going to tell you, he's a hard-working
2 guy and he's not a violent man. So you're going to hear some
3 things about James Flood during this trial as well and I think
4 that's very important." So that's evidence of good character.

5 THE COURT: Do you have the names of the people who
6 would have been called?

7 MS. KAHN: No, Your Honor, because I just want to
8 clarify that my point is not the absence of that evidence
9 prejudiced the jury substantively. I'm saying, it's the empty
10 promise itself.

11 If he had said, I'm going to show you that James Flood
12 has once traveled to the moon, I don't need a person to say, I
13 had evidence that he traveled to the moon to prove prejudice on
14 that. It prejudiced the jury by telling them, I'm going to show
15 you something and not show it to you. That's the nature of the
16 prejudice itself. It's losing credibility and making empty
17 promises, and losing the belief of the jury.

18 And also it's Mr. McKenna was making the opening
19 argument, so I don't think Mr. Lawlor's proclamations about what
20 happened there are really relevant?

21 MS. WILKINSON: I'm sorry for that.

22 MS. KAHN: That's okay.

23 Well, he put in his affidavit about what his strategy
24 was and he didn't have one.

25 THE COURT: Is there an affidavit from McKenna?

1 MS. KAHN: There is not.

2 Also, I just also want to clarify that it was -- you
3 know, the government is standing here now and saying that they
4 didn't think that defense counsel went too far in their opening
5 argument, but they are the ones that objected to it. The Court
6 agreed with their objection. The counsel was admonished for
7 what he did, so it can't be that was, sort of, so innocuous.

8 THE COURT: Are you back on the first issue?

9 MS. KAHN: Yes, I'm -- yes, just augment on the
10 evidence of innocence piece that, you know, it's sort of not
11 just me making it up.

12 THE COURT: I just heard you say, he was admonished.
13 He hadn't done anything wrong to that point.

14 MS. KAHN: Except that that's what the Court said.
15 The Court said, "Mr. McKenna, we have your words. We'll see
16 what your evidence does. You're going to have to deliver on
17 what you said.

18 I'm afraid that's right. I mean, I don't know how you
19 argument he didn't do it. It's a very different proposition to
20 say that the government hasn't proved it. Very different
21 proposition to say that the government hasn't proved it. But to
22 say he didn't do it, no one established he didn't do it. So
23 it's even going far afield from what an opening argument is
24 supposed to do, which is summarize the evidence. There is no
25 evidence that you're going to put on that he didn't do it." And

1 with that I'll --

2 THE COURT: I think I understand that part.

3 MS. KAHN: Thank you, Your Honor.

4 THE COURT: Do you have anything further to say on
5 those issues?

6 MS. WILKINSON: No, Your Honor.

7 THE COURT: You want to go on to your next issue? Is
8 there anything more to say about --

9 Well, maybe you should go into the issue of conceded
10 evidence sufficient to finding guilt or have you covered that
11 already?

12 MS. KAHN: It's covered.

13 THE COURT: I don't know that you addressed that. You
14 want to say anything about it, Ms. Wilkinson?

15 MS. WILKINSON: Your Honor, they didn't concede Mr. --
16 I should just submit on my brief, because I lay it out in there,
17 Your Honor, but they did not concede that Mr. Flood was guilty
18 here. They conceded the two points that they had to concede
19 because there was such powerful evidence over it and it was a
20 tactical decision.

21 Again, as like at Mr. Lawlor's affidavit that he --
22 that he stated at paragraph 5E, I do not agree we conceded
23 elements of the offense. Our position at trial was that
24 Mr. Flood was not present at nor aware of the kidnapping of the
25 victim and did not participate in the conspiracy to commit the

1 act or the substantive act. We conceded those things, that
2 means the car and the phone because that -- we thought we had to
3 concede them by pushing out the theory that we could. And of
4 course, that's true because --

5 THE COURT: On the car, what evidence was there?
6 What, sale by Flood to Lighty?

7 MS. WILKINSON: There was testimony that he had
8 purchased the car from Mr. Lighty.

9 THE COURT: By who?

10 MS. WILKINSON: I don't recall. Let me see if I can
11 go back about --

12 THE COURT: Who testified to that?

13 MS. WILKINSON: I think that -- give me one second,
14 Your Honor.

15 THE COURT: Well, Flood was the owner of the car at
16 the time of the murder, is that the statement?

17 MS. WILKINSON: Yes.

18 THE COURT: The evidence showed that. Then the issue
19 was, Flood had purchased it from Lighty sometime prior?

20 MS. WILKINSON: Yes, Your Honor. Hold on, I'm getting
21 to the -- I think I put it in my brief, maybe not.

22 THE COURT: One of the girlfriends talk about that?

23 MS. WILKINSON: I believe his girlfriend,
24 Ms. Marshall, talked about it at trial, but I also believe that
25 his -- I can't remember right now, Your Honor. I'm sorry. If

1 the Court needs that, I will certainly supplement.

2 THE COURT: Well, on the cellphones, there actually
3 were phone calls that were made on Flood's cellphone.

4 MS. WILKINSON: Correct, and people testifying that
5 that was his phone number.

6 THE COURT: And then there were phone records that
7 showed that it was his cell phone?

8 MS. WILKINSON: Of course.

9 THE COURT: Well, all right so.

10 MS. WILKINSON: Un-refutable type of evidence. In
11 other words, Ms. Marshall is actually a witness for the defense
12 and she would testify that it was his car and his phone number,
13 for example. There's the facts that you -- that were just
14 well-known throughout the the trial, a lot of different
15 evidence.

16 THE COURT: Well, all right. And I suppose it could
17 be argued and you ought to, I think, address this, Ms. Kahn,
18 that these are essentially irrefutable facts. And the idea of
19 counsel conceding that he'll concede them looks like something
20 is being given up, which really isn't very much because he was
21 going to be beaten on those points anyway.

22 So, technically, perhaps not a bad decision to say, we
23 give on those points. We're not going to make --

24 The reverse would be, we're going to contest them and
25 it's not even a central issue in the case.

1 MS. WILKINSON: Of course, Your Honor. I mean, it's
2 more important to --

3 THE COURT: The question is whether there was a
4 tactical decision here that could be defended as just a decision
5 by counsel to forego. And may even look like they're making a
6 concession, which candidly wasn't much.

7 MS. WILKINSON: Yeah, it's more important to show what
8 the government couldn't show. For example, we didn't have a
9 cooperator that put him at the scene of the murder. We didn't
10 have anybody to say, this is what happened that night.

11 THE COURT: All right. Anything more on this point?

12 MS. KAHN: No, Your Honor.

13 THE COURT: All right. Let's go on to your next
14 point, which is -- that is on the concession of guilt. That
15 would be Item 60, the limiting instruction following examination
16 of Latasha Massey.

17 MS. KAHN: Yes, Your Honor. This is just a brief
18 point. So Latasha Massey testified --

19 THE COURT: Tell me her relationship again.

20 MS. KAHN: Latasha Massey was Tony Mathis' girlfriend.

21 THE COURT: Mathis' girlfriend.

22 MS. KAHN: Yes. So, she testified that Mr. Flood
23 called Mr. Mathis who -- and then came by. And then Mathis left
24 with Flood and later Mathis came back and had blood on his
25 clothes.

1 Lighty's counsel wanted to use that as evidence of
2 their theory that it was Flood and Mathis that did the crime.
3 So they questioned Massey in a way and -- so that when they
4 tried to draw that out, the government came back and questioned
5 Massey in a way that indicated that Flood must have called
6 Massey and returned when Massey returned with -- I mean, Mathis,
7 and Mathis returned with blood on his clothes from a different
8 murder.

9 So, just because that was so jumbled, I'll read this
10 section from the record. "Now, you indicated -- this is the
11 government questioning Ms. Massey. "Now, you indicated that you
12 remembered that incident because you remembered hearing about a
13 murder or a kidnapping, or something in the news the next day;
14 is that correct?" So --

15 THE COURT: Her answer was?

16 MS. KAHN: Yeah, Mathis, her boyfriend, came in with
17 blood. And so she said, "Oh, you know, then I heard that there
18 was a murder. So I thought --

19 THE COURT: Talking about the Hayes murder?

20 MS. KAHN: Well, she just says, I thought he must have
21 been involved in whatever murder it was. So, apparently, she
22 couldn't remember what murder it was. So, she says, yes.

23 "Now, where you lived was a high crime area back then,
24 isn't that correct?

25 "Yes."

1 THE COURT: In the end, you're saying -- what is the
2 essence of the objection? Let me work back from there, because
3 I'm not sure where we're going to end up.

4 MS. KAHN: I'm sorry, Your Honor. The essence of the
5 claim is through this government's questioning, it left the
6 impression that Mr. Flood had been involved in some other murder
7 other than the Hayes murder which is, of course, highly
8 prejudicial to the jury. They did not request any kind of
9 instruction or a mistrial or anything suggesting that the jury
10 should not consider any possibility that Mr. Flood was involved
11 in --

12 THE COURT: Did they argue it in closing argument? I
13 mean, in terms of the -- did the defense argue that she was
14 confused?

15 MS. KAHN: Actually, at this point, I don't recall.

16 THE COURT: Wouldn't that matter though?

17 MS. KAHN: I would have put that probably in the
18 petition had they done so. I'm not sure that it has to come up
19 in argument when a jury has been left with the impression that
20 Mr. Flood could have been involved in another murder. I think
21 that's fairly prejudicial without anyone even going back over
22 it, so it just seems to me at that point --

23 THE COURT: Is it constitutionally ineffective
24 assistance of counsel even to not ask for an instruction, a
25 limiting instruction middle of trial, but perhaps then going

1 forward and arguing afterwards that there's confusion in the
2 testimony?

3 MS. KAHN: Oh, I see. Did --

4 THE COURT: Did Lawlor or McKenna, whoever was doing
5 it come back and say, you know, Latasha Massey could not be sure
6 as to whether Mathis was -- whether Flood was at the scene or
7 not at that scene, whatever her testimony was.

8 MS. KAHN: Well, because Latasha Massey was not
9 implicating Mr. Flood necessarily --

10 So, it's a little bit confusing because, essentially,
11 the government's position was that because Massey's testimony
12 didn't line-up with their theory, because it didn't put Wilson
13 --

14 THE COURT: Massey was a defense witness?

15 MS. KAHN: No, Massey was -- yes, Massey was a defense
16 witness for Lighty. So Lighty -- Lighty's theory was that Flood
17 and Mathis did the crime. So Lighty's people put them on.

18 The government didn't like that theory, so they
19 cross-examined Massey to try to give the impression that this
20 wasn't the Hayes murder because it didn't match up with their
21 timing or with their theory of the case, so this must have been
22 some other murder. There's so many murders.

23 THE COURT: The government wanted some other murder,
24 is that what you're saying?

25 MS. KAHN: Right, right. So you know, the jury is

1 left with the impression, there's some other murder and nobody
2 tells the jury, don't consider the fact that there was some
3 other murder in your consideration of whether he's guilty of
4 this murder.

5 THE COURT: But defense counsel called Massey. Is the
6 position here that she was even called as a witness, because
7 that certainly would go to the fair examination by the
8 government.

9 MS. KAHN: Lighty's defense counsel called her, not
10 Flood's.

11 THE COURT: And was there objection to her being
12 called by Flood?

13 MS. KAHN: I don't think that -- I don't think Flood
14 had an objection that they could have made. I mean, their
15 defenses were contradictory defenses. You know, Flood wanted to
16 say, this was Lighty and Wilson; and Lighty wanted to say, this
17 was Flood and Mathis, I believe. So the defenses were not
18 together. So Latasha Massey helped Lighty's defense. And until
19 they brought up this other --

20 THE COURT: Well, what could -- what could have been
21 done to unscramble this, either by a limiting instruction or
22 argument by Flood's counsel at closing?

23 MS. KAHN: I think an instruction. I would have asked
24 for an instruction, a motion for mistrial. I wouldn't have
25 revisited it in closing.

1 THE COURT: If I would have given an instruction, what
2 would you have asked for?

3 MS. KAHN: I would have said, you've heard the
4 implication from this testimony that Mr. Flood was somehow
5 involved in another murder. You are in no way to consider her
6 testimony as evidence that he was involved in another murder or
7 consider the possibility that he was involved in another murder
8 in your deliberations in this case, rather than just leave it
9 out there unquestioned that he picked this guy up and brings him
10 home bloody, and it wasn't the Hayes murder.

11 I mean, that's really extremely prejudicial. That's
12 really the balance of that claim.

13 THE COURT: Let me hear the government's response.

14 MS. KAHN: Certainly.

15 MS. WILKINSON: Your Honor, I'm not really sure how to
16 respond because I can't even figure out what the limiting
17 instruction would have been from the Court, because it's so
18 convoluted here. I think that what Ms. Kahn is trying to say is
19 that the defense should have had the Court highlight the fact
20 that Ms. Massey is talking about a different murder and say,
21 there's no evidence of a different murder involving Mr. Flood.

22 Again, this is a strategic call that an attorney might
23 make in the course of a trial. I'm not even sure the Court
24 would have given this. This was a very brief witness that
25 Lighty offered. It -- they had the opportunity, obviously,

1 defense counsel -- I can't even recall if they cross-examined
2 Ms. Massey as well. The only point the government made in its
3 cross-examination of Ms. Massey is that --

4 THE COURT: Cross-examination would have been to say,
5 this other murder that you talk about, tell me about that.

6 MS. WILKINSON: Right.

7 THE COURT: And that would have been --

8 MS. WILKINSON: That might have been ineffective. But
9 in regard to this, it's simply that she didn't recall the date
10 that she heard about a murder on TV. She saw her boyfriend with
11 blood on his clothes. I mean, frankly, it was such
12 inconsequential evidence anyway. It came out very flat in the
13 course of trial. It just is what it is and the inference that
14 Ms. Kahn wants to draw from it, you have to do a kind of a bunch
15 of different mental gymnastics to even get to the prejudicial --

16 THE COURT: Let me see if I understand the line here.
17 Essentially, she does say that she saw --

18 MS. WILKINSON: A murder on TV.

19 THE COURT: What's her testimony in her direct
20 examination? What is she there to say from defendant's
21 standpoint?

22 MS. WILKINSON: She said words to the effect that,
23 that she saw something on TV about a news report and she
24 harkened back to seeing her boyfriend who had gone into
25 Mr. Flood's car earlier on some day.

1 THE COURT: This is Lighty calling?

2 MS. WILKINSON: Because remember --

3 THE COURT: He wants to pin the murder on Flood.

4 MS. WILKINSON: He wanted to really pin the murder on
5 Mr. Massey. Mr. Massey was the --

6 THE COURT: Mr. Mathis.

7 MS. WILKINSON: Mr. Mathis, he was the -- exactly, he
8 was the unknown person, the big pink elephant in the room for
9 Mr. Lighty. He was the one he wanted to focus all of this time
10 and effort on that Mr. Mathis was the one that did it. And this
11 was his only evidence --

12 THE COURT: Mathis and Flood was Lighty's targets,
13 were Lighty's targets?

14 MS. WILKINSON: That it wasn't him, that Mr. Mathis
15 was this -- the other person.

16 THE COURT: Mathis and Flood?

17 MS. WILKINSON: Yes.

18 THE COURT: For purposes of this case, we're talking
19 about Flood and not Mathis.

20 MS. WILKINSON: Yes.

21 THE COURT: And so she says that, but in the course of
22 her testimony, why would she be saying, and I saw blood on
23 Flood's shirt?

24 MS. WILKINSON: Not Flood.

25 THE COURT: She's talking about Mathis. So she's

1 Mathis' girlfriend.

2 MS. WILKINSON: Yeah, she's Mr. Mathis' --

3 THE COURT: She saw blood on Mathis' shirt.

4 MS. WILKINSON: That's why I'm saying the mental
5 gymnastics, Your Honor. The only way Mr. Flood's name comes in
6 it is she puts Mr. Mathis in Mr. Flood's vehicle the morning or
7 the day that he comes home with blood on his pants; that he had
8 gotten into Flood's vehicle, came back sometime later, had blood
9 on his pants, saw a news report and remembers thinking, it must
10 have something to do with that.

11 THE COURT: Okay. Was the implication that Flood was
12 involved with another murder or possibly Mathis?

13 MS. WILKINSON: No, Mathis.

14 THE COURT: Maybe that's really what we're talking
15 about, Ms. Kahn. If she saw blood on Mathis' shirt and she --
16 if the argument was that she became confused about Mathis, was
17 he even alive at that point? He certainly wasn't in the trial.

18 MS. WILKINSON: No, he was never charged.

19 THE COURT: So, she's -- they're asking about whether
20 there's some other murder involving Mathis, not necessarily
21 Flood. Why would that be prejudicial to Flood?

22 MS. KAHN: Would Your Honor like me to respond?

23 THE COURT: I'm asking you that question.

24 MS. KAHN: Oh, this is how I see it. Lighty's counsel
25 was -- should I --

1 THE COURT: Wherever you wish.

2 MS. KAHN: Lighty's counsel was painting her testimony
3 as circumstantial evidence that Mathis and Flood were involved
4 in the Hayes murder by virtue of the fact that Flood picked him
5 up and brought him back. And then when Mathis came back, he was
6 bloody. That was their circumstantial evidence that he did a
7 murder, which was the Hayes murder.

8 The government says, well, that doesn't make any
9 sense. It could have been -- you lived in a high crime area.
10 There's all kinds of murders. Well, that's piggybacking on
11 Lighty's theory that Flood picked up Mathis, took him, brought
12 him back with blood after some other murder, because it wasn't
13 Mathis murder. The government left that impression that it was
14 another murder that involved Flood in the exact same
15 circumstantial way that Lighty's counsel was suggesting.

16 THE COURT: Did they go anywhere beyond the bloody
17 shirt? I mean, how much more did they say about that?

18 MS. KAHN: I believe that was, essentially, the
19 balance of the arguments.

20 THE COURT: Okay. I understand your argument. Let's
21 go on to something else.

22 Well, before you argue the, the last collective
23 prejudice, why don't you go back to the ineffective assistance
24 on, on the plea bargain, plea negotiations.

25 MS. KAHN: So, the lead claim in the petition is that

1 counsel was unquestionably ineffective for failing to make any
2 effort to seek to resolve this case by way of a plea. You know,
3 as the Supreme Court has been clear that the plea negotiation
4 process not only is a critical part of the -- of the criminal
5 justice process, but is the criminal justice system, I believe,
6 is the language that they used in *Frye*.

7 This -- I mean, this is particularly true where, you
8 know, the evidence is strong, the consequences of losing are a
9 mandatory life sentence. You know, as we know, we don't see
10 very many defendants walking out this door. Once you're in here
11 and over here, your conviction is very, very likely, which is
12 why I pointed out in the petition that at the time that
13 Mr. Flood was convicted, 95 percent of our criminal defendants
14 pled out and counsel failed to make any effort.

15 It wasn't until actually the government approached
16 them during jury selection and said, are you guys going to look
17 for anything? Are you going to try to get an offer here? You
18 know, do you want to try to bring him in? And they never took
19 that to the client. They never discussed it at all. And
20 Mr. Lawlor puts in his affidavit, this was my first federal
21 felony case. I cannot understand for the life of me why I
22 wouldn't have pursued a plea in this. It's everybody's stock
23 and trade. It's mostly what we do.

24 You know, it really, once you're indicted, a lot of
25 the time, right, it's really where it's about negotiating down

1 the sentence and it was simply never done. So, you know, any,
2 any sentence less than mandatory life would have been better
3 than a virtually assured sentence of mandatory life coming in
4 here to be tried.

5 So, the government says, we can't prove, you know,
6 there was no offer. We all agree there was no offer, but of
7 course, that is a product of counsel's ineffectiveness that
8 there was no offer. They never sought an offer.

9 THE COURT: You're indicating that the fact that
10 counsel did not initiate a request for a plea in and of itself
11 establishes ineffectiveness?

12 MS. KAHN: I believe in this day and age --

13 THE COURT: Is there -- does the cases say that?

14 MS. KAHN: No, because it's so vanishingly rare where
15 95 percent of cases resolved by way of plea, it's vanishingly
16 rare and almost unimaginable that in a case of this nature, in a
17 murder case carrying mandatory life that no one would even seek
18 an offer. That's the only way you can save your client.

19 THE COURT: Aren't there cases actually, though, that
20 have held that even if the government says, let's talk plea
21 negotiations and nothing picks up from there, that the failure
22 to communicate is not ineffective assistance.

23 MS. KAHN: In this case, it wasn't the failure to
24 communicate. We're even a step more ineffective than that.
25 There was never even an offer sought.

1 THE COURT: Is that a stronger case or a weaker case?
2 I'm not sure.

3 MS. KAHN: I believe it's a stronger case, because if
4 you -- at least you took a step to negotiate and at some point
5 along the line you made some sort of decision that maybe that
6 wasn't a very good offer for your client. There was some
7 attempt to resolve the case. Here, it was just absolutely never
8 pursued.

9 And, you know, I have an expert affidavit --

10 THE COURT: You're contending it was, in fact, at
11 least some form or something or other happened during jury
12 selection.

13 MS. KAHN: Well, the government approached counsel and
14 said, you can bring him in and you can proffer him. And they
15 thought, well, we're not going to do that now and they never
16 even asked Mr. Flood about that. And so, you know, it just --
17 and at that point, at jury selection, an offer is probably not
18 going to be very good.

19 But they made an overture, so there was going to be
20 maybe some offer depending on what the proffer would be, but
21 they didn't even take it to the client. So, you know, as we
22 point in expert affidavit and Mr. Lawlor's affidavit, and it
23 simply just doesn't happen.

24 So in government's response, they say, well, we
25 wouldn't have made him an offer without cooperation. Well,

1 there's a couple problems with that. First of all, that's there
2 averment in their petition. It's not a sworn statement. It's
3 not testimony, so. It's not how we get evidence into the
4 record, so I don't think that we -- so I think we really need --

5 THE COURT: I don't know exactly what was spoken to
6 McKenna or Lawlor? What words were spoken? What does he say?

7 MS. KAHN: That Ms. Wilkinson said to them?

8 THE COURT: Yeah, not what you think he might say if
9 we had a hearing some day, but what do you say now to try and
10 establish a colorable basis to even have an evidentiary hearing
11 on this point? It's very important. The words matter here in
12 terms of what's said.

13 For example, let me just give you the hypothetical.
14 The government says to the defense counsel, are we ever going to
15 talk plea, at some point? Suppose those are the only words for
16 now.

17 MS. KAHN: Mm-hmm.

18 THE COURT: Well, that's touching on -- is there some
19 obligation on the part of the defense counsel to say, well, not
20 now or something like that; or yes, let's talk? Is that
21 omissive right there? Is that something you have to communicate
22 to the client, maybe we ought to talk plea while the jury is
23 being selected?

24 MS. KAHN: If you're in a case where you're facing
25 mandatory life and the government is approaching you and

1 potentially offering something, I think you're absolutely remiss
2 --

3 THE COURT: Are they offering anything?

4 MS. KAHN: They said, do you want to come and talk?
5 You have to bring him in. And they just said, we're not doing
6 it. They didn't ask Mr. Flood if he wanted to do that.

7 THE COURT: Okay.

8 MS. KAHN: So --

9 THE COURT: I don't think I have all that in Lawlor's
10 affidavit, but that's what you're saying now. He said --

11 MS. KAHN: It says -- his affidavit says, "During jury
12 selection, I was approached by Ms. Wilkinson about the prospect
13 of pleading. Mr. McKenna and I met with her and Ms. Johnston
14 that same night after trial. We were informed that in order to
15 receive an offer, Mr. Flood would have to proffer. Mr. McKenna
16 and I discussed this and decided proffering at this stage of the
17 case was too risky. We failed, however, to permit Mr. Flood to
18 make an election about proffering. That said, we did discuss
19 the notion of pleading guilty with him and he was not reluctant
20 to do so."

21 THE COURT: When did they talk about discussing the
22 possibility --

23 MS. KAHN: That is not entirely clear from the
24 affidavit.

25 THE COURT: Wouldn't that be significant if they said

1 then and there, we talked --

2 MS. KAHN: Well, I imagine it had to be then and there
3 because they had never sought an offer, and they had no reason
4 not to seek an offer in this case. I mean, they're not going to
5 come in here when very likely --

6 THE COURT: I need to follow exactly what you're
7 arguing. If there's a general statement, are you going to come
8 in, but you have to proffer. And at that point, the defendant
9 is not totally resistant to a plea, isn't there something that's
10 being communicated then and there --

11 MS. KAHN: Well, there might have been.

12 THE COURT: -- going forward. Just the idea of maybe
13 talking then and there, so there is a communication and there
14 is, at least, in the air plea discussions that never go
15 anywhere. And then there's a decision tactically made. We
16 didn't think -- maybe counsel rues it now, but we didn't think
17 it would make good sense at that stage of the game, that late
18 stage of the game. What was it going to get us? Nothing.

19 MS. KAHN: Well, A, they're absolutely right that
20 waiting until jury selection until the government walks over to
21 asks you is too late. Plea negotiations needed to happen early
22 and often in this case.

23 THE COURT: Government didn't have to offer anything,
24 right, ever?

25 MS. KAHN: Absolutely not. And if they had gone and

1 said, what are you offering us? And they said, bye-bye, we're
2 not listening to you or we're not going to listen to you without
3 cooperation and your client won't cooperate, that's in your
4 notes, that's in your file, that's in your letters to the
5 client, we're done. None of that happened here.

6 THE COURT: But they did say, you represented -- I
7 haven't heard from Ms. Wilkinson yet who is going to be arguing
8 her own cause, I guess, but you did say that they said he'd have
9 to come in and proffer. And they thought, not a good idea at
10 this stage.

11 So why isn't that a communication of something, not
12 necessarily a plea offer? Then when you go back to your client
13 and say, would you plea under the circumstances or would you
14 plea? And he says, well, maybe. Is that all some -- is that
15 all add up to ineffective assistance? Maybe it does in your
16 theory.

17 MS. KAHN: It does in my theory. None of that should
18 have waited until jury selection. He was not told --

19 THE COURT: It's because he didn't go to the
20 government before jury selection and say, can we talk, can we
21 talk plea?

22 MS. KAHN: Should have been going there years before
23 jury selection, can we talk plea? And I think that's what he
24 would say now and what my expert counsel says now. That's what
25 everybody does.

1 THE COURT: I know that it's a standard part of
2 practice and maybe the major part of criminal defense work in
3 both federal and state court, but the question is under these
4 circumstances whether you've got constitutionally ineffective
5 counsel at that.

6 MS. KAHN: I can't think of a stronger example of
7 constitutionally ineffective of assistance of counsel when
8 there's one way, basically, to save your client from mandatory
9 life and you don't pursue it at all.

10 THE COURT: Well, it sounds to me that one way to save
11 your client from any kind of criminal conviction is never to go
12 to the government and ask for anything about a plea. That's
13 what you're saying in effect. That's what this adds up to.

14 MS. KAHN: Oh, is the Court suggesting that you would
15 roll the dice and get your client sentenced to mandatory life so
16 you could go back and --

17 THE COURT: Well, but you're saying that the mere
18 failure of defense counsel to ask for a plea, to ask for plea
19 negotiations ipso facto is ineffective assistance
20 constitutionally speaking and upsets any verdict that follows.
21 That's what you're arguing. And I'm asking you, then is it
22 always in the interest of a defendant to have his counsel not
23 ask for plea discussions?

24 MS. KAHN: I have a couple responses to that.
25 Absolutely not. That would be disbarable conduct to throw a

1 trial where your client gets mandatory life in the hope that
2 you're going to get the blue elephant, pink elephant of relief
3 in 2255, which hardly ever happens and there are many, many ways
4 to make sure that doesn't happen.

5 The Court can inquire on the record, were there plea
6 negotiations in the case? Was there an offer? Did you seek
7 one? What was it? Did you tell him, the client? Did you know
8 --

9 THE COURT: Well, the Fourth Circuit has come down
10 pretty hard on the government saying -- the judiciary saying
11 anything about plea negotiations, believe me. I was in a case
12 sometime back and I don't know whether Ms. Wilkinson was, where
13 I suggested to a defendant, why don't you go and talk to the
14 government, see what they offer. And the Fourth Circuit said,
15 you can't do that, which I don't agree with, but nonetheless
16 that's what they've said.

17 MS. KAHN: Your Honor, I think the Court becoming
18 involved in encouraging or discouraging negotiations is
19 different from putting --

20 THE COURT: Well, can the Court say, have there been
21 plea negotiations? What was said when? And so, aren't I --
22 wouldn't the Court be four square in the -- wouldn't I have to
23 be judging whether there had been an advance effective
24 assistance of counsel by reason of the nature of the
25 conversation?

1 MS. KAHN: The only reason I'm bringing this up is to
2 put to bed the notion that somehow counsel is going to
3 intentionally not seek a plea offer in the best interest of
4 their client so that they can maybe save up for post-conviction
5 later. You can simply inquire on the record, was there any
6 negotiation in his case? Government did you extend an offer?
7 Yes, we did. No, we didn't. Yes, we offered him 20. No, he
8 wouldn't take it. Done for the record, over.

9 THE COURT: I think that's problematic. I'm not sure
10 the judge can do that. I really -- I'm concerned about it.

11 MS. KAHN: Well, if the judge can't, I think we still
12 go back to the fact that if anybody is going to commit complete
13 professional conduct by not representing their client at trial,
14 not seeking a plea so that they maybe can come back, get a new
15 trial --

16 THE COURT: Well, don't spend too much time on that.
17 I just was sort of extending it out a little bit and just
18 suggesting those -- that's sort of the inherent problem with the
19 argument really.

20 This is a little farther along the spectrum, but
21 candidly not much. I mean, you're upsetting a trial years
22 later, a major trial on a major crime by just suggesting that
23 this casual and that's what it sounds like pretty much to me
24 back and forth -- well, not even that. You're saying the
25 failure to follow up on this casual, isn't that --

1 MS. KAHN: No, I think the casual is after the game is
2 over.

3 THE COURT: Okay. So you're -- all right, we're clear
4 on this now that nothing was initiated prior by counsel and that
5 was constitutionally ineffective. Is that a fair statement?

6 MS. KAHN: No offer was ever sought. They say they
7 had a client who is amenable. I don't know at what point they
8 bothered to ask him whether he was amenable, but he was amenable
9 at some point. And never told him, look, the government just
10 walked over. Do you want to proffer? Nothing. At that
11 point -- I mean, that's all that did happen and that was too
12 late. It should have all happened before. What do you want
13 from us?

14 So the government comes now and says, well, we
15 wouldn't have offered him anything if he didn't cooperate. He
16 hasn't said he would cooperate. There's no hard and fast rule
17 that says you have to cooperate, so there's no reason that
18 Mr. Flood would have now known that was part of the deal.

19 And these are, again, self-serving representations,
20 unsworn representations in a responsive pleading, which is why I
21 believe a hearing is required on that issue. If the government
22 is going to say --

23 THE COURT: Tell me what a hearing would look like. I
24 was trying to get my hands around that as I was preparing for
25 this. What do you expect to elicit at a hearing?

1 MS. KAHN: Well, for example, the government would
2 testify that, well, we never would have -- it's our policy that
3 we never would have offered him anything in this case unless he
4 cooperated. And you know, I could theoretically cross-examine
5 on other cases where they have offered non-cooperation pleas if,
6 for example, the client testifies.

7 So, if they say, we never would have offered him
8 anything without cooperation and the client says, well, I never
9 would have cooperated, then I agree the claim is over.

10 THE COURT: Was he maintaining his innocence, by the
11 way, throughout the trial?

12 MS. KAHN: Well, he was never offered a plea, so he
13 went to trial. I mean, no, he didn't go in front of the jury
14 and say, I did it, so, yes, but he -- you know.

15 THE COURT: Let me ask you a question. Could one read
16 on the basis of this case that a plea was -- plea discussions
17 were never really in the picture? I mean, in a case like this
18 as opposed to many? Candidly, I'm not sure why the government
19 would have gone to him in the course of jury selection. It's a
20 little bit peculiar to me and maybe Ms. Wilkinson can tell me
21 why it came at that stage, if it came at all.

22 MS. KAHN: I believe she doesn't recall that that
23 conversation occurred, but that's a disputed matter that has to
24 be resolved at a hearing, I believe. You know, if -- and what
25 they say is not that it was never in the cards, we never would

1 have offered him anything. They do say that we would have
2 demanded cooperation, but nobody ever asked Mr. Flood whether he
3 would cooperate. So again --

4 THE COURT: Well, it --

5 MS. KAHN: Sorry.

6 THE COURT: I thought there was a line you read from
7 Lawlor's affidavit that said, he wasn't totally resistant to a
8 plea.

9 MS. KAHN: He wasn't totally resistant to a plea. It
10 doesn't speak to whether he wouldn't have been interested in
11 cooperating or proffering, because he does say, they never told
12 him about that. They never said, do you want to come in and
13 proffer. They made that decision for him, that would be bad
14 now.

15 Now, whether that would be bad a year and a half ago,
16 that's something you got to talk to your client about for a long
17 time, right?

18 THE COURT: This trial was -- we're talking about
19 when, 2012?

20 MS. KAHN: Five.

21 THE COURT: Wow, going back a long way.

22 MS. KAHN: Yep.

23 THE COURT: What happened in 2012? He did something
24 else?

25 MS. KAHN: Yeah.

1 THE COURT: Okay. Well, maybe the timeline has
2 something to do with it too. *Frye* has been decided since then.

3 MS. KAHN: *Frye* was decided between the petition and
4 the reply, but you know, *Frye* didn't really change the game that
5 much.

6 THE COURT: Well, they used the word "formal" anyway,
7 which is going to be a bit of a problem in this case.

8 MS. KAHN: Yeah, I mean, I don't think that -- you
9 know, *Frye* is on all fours with this case, because of course in
10 *Frye* there was an offer. Because just again, I just think it's
11 so unusual that nobody would even attempt. I mean, sometimes it
12 doesn't go very far. You know, sometimes somebody will go to
13 the government and they'll say --

14 THE COURT: Go ahead.

15 MS. KAHN: They'll say, they're offering 30. They're
16 not going to move off of it. My client is not going to go for
17 more than 12 and it kind of, you know, it falls apart there.
18 But to have no, no approach made, it's really fairly unique in
19 my experience and the numbers just don't bear that out.

20 When 95 percent of people are pleading, I don't think
21 those 95 percent came in and fell on their swords with no
22 agreement and we know that 95 percent of people aren't
23 cooperating. So there are offers being made regularly. And you
24 know, if the government doesn't want to go to defense counsel
25 and make an offer, which they could, then it's incumbent upon

1 defense counsel to go and ask for one.

2 THE COURT: I assume you're familiar with the
3 *Merzbacher* case from the Fourth Circuit.

4 MS. KAHN: I am not.

5 THE COURT: You are?

6 MS. KAHN: I'm not.

7 THE COURT: Does the government know about *Merzbacher*?

8 MS. KAHN: I am not.

9 THE COURT: Oh, well, let me give you the cite.
10 706 F.3d 356, 706 F.3d 356, a 2013 case. "Failure to
11 communicate a much firmer offer here, no ineffective
12 assistance."

13 MS. KAHN: I certainly agree, again, that there could
14 be circumstances where the prejudice in that situation is
15 different. Maybe they couldn't prove that the person would have
16 taken the better offer or maybe they couldn't --

17 THE COURT: Well, you can't do it either, can you?
18 Can you do that -- you can't do that either. All you can say
19 is, had -- had there been discussions and had there been a
20 firmer texture given to the nature of the -- what the plea might
21 be that the defendant would have accepted it. Are you arguing
22 that?

23 MS. KAHN: No, I can't say that because of the level
24 of ineffectiveness here. In that case, at least the attorney
25 made an effort. They got some kind of offer.

1 THE COURT: Why is there qualitatively a difference?
2 If they get a firmer offer that they don't communicate. Here
3 they just -- it's a much flimsier, quote-unquote, offer and
4 really may not be an offer at all --

5 MS. KAHN: Right.

6 THE COURT: -- and they don't communicate it. Why is
7 this a stronger case?

8 MS. KAHN: There is no offer in this case. That's why
9 it's a stronger case. In that case, at least counsel took one
10 step of ineffectiveness -- I mean, of effectiveness toward at
11 least attempting to get a plea. Whether he then failed
12 somewhere down the road and in that case --

13 THE COURT: Because there was a firm offer in the
14 other case, it wasn't communicated, that's a weaker case than
15 this case where there wasn't a firm offer that wasn't
16 communicated.

17 MS. KAHN: The weakness in this --

18 THE COURT: Having trouble with the logic of that
19 argument frankly.

20 MS. KAHN: The weakness and the strengths of the cases
21 depend on the facts of the cases. So, in that case it wasn't
22 communicated and maybe there's a letter in the file from the
23 client that says, I'd never take anything who -- I don't know.
24 You know, there's scores of cases like this and the fact
25 patterns are all different. I mean, there's one in the Fourth

1 Circuit where, again, like no -- sorry.

2 THE COURT: Well, if either of you read *Merzbacher*, I
3 want you to read it because it really gets a lot closer, I
4 think, to maybe what you're arguing.

5 I understand your argument now to clearly be that the
6 total failure of defense counsel to initiate and try and pursue
7 plea discussions is a constitutionally ineffective assistance in
8 this case.

9 MS. KAHN: And I think that our -- Mr. Flood should
10 not have any less right to the effective assistance of counsel
11 because of the double layers of ineffectiveness.

12 If the counsel had gone and at least done something,
13 and then made some strategic decision about not communicating.
14 Here, I don't even get to get that far, because they didn't do
15 anything. So, essentially, I feel like the Court is trying to
16 say, well, if they had gotten an offer, you'd have an easier
17 time proving their ineffectiveness. But they didn't get an
18 offer, so I'm stuck and Mr. Flood is stuck with having nothing
19 done on his behalf in the most critical portions of the
20 negotiations.

21 THE COURT: All right.

22 MS. KAHN: Thank you.

23 THE COURT: Let me hear from the government.

24 MS. WILKINSON: Your Honor, as an initial proposition,
25 it simply cannot be and nor do I think it to be true that every

1 time a defense attorney doesn't ask for a plea offer they are
2 constitutionally ineffective. I will proffer right now to the
3 Court, it happens many times up in the U.S. Attorneys' office in
4 Baltimore where the Federal Public Defenders office does not ask
5 the government for a plea agreement.

6 I'll give you an example of a case. A distribution of
7 child pornography where the man-min is five years, no priors on
8 the defendant and there is a pretty clear record up in Baltimore
9 that the defendant is going to get five years no matter what.
10 He takes the shot and goes to trial. Never asked us for a plea
11 agreement. Goes to trial and maybe he gets a year more or
12 whatever. I don't know, Your Honor. That's not even relevant.

13 The point is, is that there are many occasions where
14 defense attorneys do not ask for plea agreements.

15 THE COURT: And that's why?

16 MS. WILKINSON: Because they make their own strategic
17 decision about either to proceed to trial because the client
18 never even wants to go that far with the government, possibly.
19 That's between them, because maybe it shows a sign of weakness.
20 Maybe think they're going to roll the dice and see what happens
21 before a jury. Or they're going to plead straight up because
22 they want to plead straight up and make their own argument that
23 a sentencing regime that's very different than it used to be
24 when I started in the U.S. Attorneys office when the guidelines
25 were mandatory. There are many reasons why a defense attorney

1 might never ask for a plea offer in a particular case.

2 My second point is here is that the burden is on the
3 petitioner here. And if you read Mr. Flood's affidavit, he
4 loses on its face, because he states here, all I wanted to do is
5 avoid getting a life sentence. I was hoping I could get a plea
6 and get a lower sentence. And I know my lawyers never asked the
7 government about the possibility of a plea before trial.

8 What he never says in here is what Ms. Kahn believes
9 is so ineffective about Mr. Lawlor that, first of all, that he
10 didn't request a plea offer; but second, that he didn't somehow
11 communicate the willing -- the offer -- I don't even want to use
12 that word. The suggestion of cooperating in this case.

13 What Mr. Flood needed to put in this affidavit, if it
14 was true, is that I was prepared to accept responsibility for my
15 role in the offense and cooperate against Mr. Wilson and
16 Mr. Lighty, and testify in order to get out from underneath a
17 life sentence. Then we might be talking here, because then
18 maybe Mr. Lawlor should have advised his client that the
19 government had possibly made these overtures, which I frankly do
20 not recall if we did, Your Honor.

21 THE COURT: Did you ordinarily make verbal kinds of
22 overtures before they get written? I guess you do.

23 MS. WILKINSON: All the time, Your Honor. That's plea
24 negotiations, like -- the original conversation sometimes it
25 comes from the government, do you want a plea offer? Sometimes

1 it comes from the defense. Hey, can you get me a plea offer? I
2 don't think my client is interested --

3 THE COURT: Why so late at sentencing? It seems a
4 little unusual to me.

5 MS. WILKINSON: Sentencing? You mean at jury
6 selection?

7 THE COURT: Sorry, at jury selection.

8 MS. WILKINSON: First of all, I don't recall this
9 happening, Your Honor, but I -- if it did, I -- perhaps because
10 it's, you know, where the rubber meets the road so-to-speak or
11 maybe -- I have no idea because I have no recollection of doing
12 it.

13 THE COURT: Do you make any -- do you even suggest the
14 possibility of a plea discussion when you're at the point of
15 selecting the jury?

16 MS. WILKINSON: Oh, cases plead at the time of
17 selecting a jury. Many times sometimes in opening statement and
18 we'll make an offer at that point. I mean, every case is
19 different.

20 THE COURT: What kind of words do you typically use if
21 it happens in that situation? Hey, would you like to talk about
22 a plea or what? I'm not asking for this case, but you say it
23 happens in other cases, so what's the typical dialogue.

24 MS. WILKINSON: You mean in jury selection?

25 THE COURT: Yeah. I mean, you see counsel where --

1 MS. WILKINSON: You've seen everything. Come on, why
2 is your client doing this? Let's just go to trial -- I mean,
3 let's just plead this. Why isn't he pleading? Because we
4 believe the evidence is so powerful and strong, or maybe we're
5 waiting for the witness to show up and here they are. And come
6 on, what are you doing? I mean, that might be something we
7 would say to a defense attorney.

8 THE COURT: Do counsel sometimes say, not going to
9 happen or --

10 MS. WILKINSON: Yes, of course. I mean, I can give
11 you scenarios of every situation that we just talked because
12 every case is so different and every person is different. Every
13 person charged with a crime is different. Every attorney is
14 different. Every strategic decision they make is different
15 here.

16 But, Your Honor, I do want to talk to you about a
17 point that the Court made earlier too that I think the Court can
18 take notice of the seriousness of this case. And the fact that
19 we were pursuing the death penalty against Mr. Lighty who is the
20 trigger man here, that the government would not have made a plea
21 offer that did not include cooperation here. It just wouldn't
22 have happened because of the nature of this case and Mr. Flood's
23 involvement. Remember --

24 THE COURT: He doesn't say, Flood doesn't say, I would
25 have testified against Lighty.

1 MS. WILKINSON: Correct, unless he would testify
2 against Mr. Lighty, because remember, we did not have that in
3 this case. We did not have someone that was there and could
4 tell us minute by minute what happened. This was a highly
5 circumstantial, though compelling and powerful case against
6 these particular defendants.

7 But it wasn't like, for example -- I'll refer to a
8 case that I tried before Your Honor, *Higgs* and *Haynes*, where we
9 had a cooperator in the back seat who testified about what
10 happened. We didn't have that in this case. I think the Court
11 can take notice about that where we have three people involved
12 in a brutal killing of a policeman's son involving a kidnapping
13 across state lines where he's on his knees begging for his life;
14 that unless you have something to offer us, we have no incentive
15 to --

16 Frankly, all of them deserve life sentences and that's
17 exactly what should have happened in this case.

18 THE COURT: Didn't you indict Flood for capital murder
19 at first too? I thought you backed off of that.

20 MS. WILKINSON: I can't remember the focus, but there
21 was some point a no seek. And remember, at the very beginning
22 of this case, Your Honor, where we did not know what was going
23 on, Mr. Flood was even in the Grand Jury because we didn't know
24 his involvement at that point, obviously.

25 And I don't remember the sequence of events, but at

1 some point we must have thought that Mr. Flood could be a
2 witness in this case and, actually, put him in the Grand Jury.
3 But of course he lied and that was part of the evidence at
4 trial.

5 And I think that was the part of the evidence
6 involving his car as well, Your Honor, that we were able to
7 prove it through that scenario going back to another question
8 that the Court had.

9 But here, more importantly, what we're looking at here
10 is a defendant who has not come forward and said that any of
11 this would have happened; that had he known that the government
12 said this to his lawyer, even assuming that it's true during
13 jury selection that he would have embraced that. He would have
14 come in, he would have proffered, he would have truthfully done
15 it. Where is the prejudice or harm here on a constitutional
16 ineffectiveness question under *Strickland*? The Court has to
17 make both findings here.

18 First, the government argues that it cannot be that
19 there is an absolute rule that if you don't ask for a plea
20 agreement you are ineffective as a defense attorney. That
21 cannot be.

22 THE COURT: That's the essence of the --

23 MS. WILKINSON: They're argument.

24 THE COURT: -- the claim here.

25 MS. WILKINSON: That is absolutely the essence of the

1 argument and it just cannot be. For the reasons also that the
2 Court suggested because, you know, why not come up and raise it
3 later then and say, oh, I never asked for a plea. You get a
4 second bite because I didn't follow the rule of defense attorney
5 work that you have to ask for a plea.

6 Many attorneys choose not to ask the government for a
7 plea offer. Maybe they're going to sit back and wait and see if
8 the government does. They don't want to negotiate against
9 themselves. Maybe they think they should just go to trial and
10 roll the dice. Maybe their client is innocent and --

11 THE COURT: Okay. That's an interesting thing though
12 to consider. That's all true what you say, but we have an
13 attorney who said, I goofed. I should have done it, I would
14 have done it. Now, does he carry the day because he says that?

15 MS. WILKINSON: No.

16 THE COURT: You can argue why generically, you know,
17 it wouldn't be -- and maybe that's the way the case gets
18 resolved in the end. The mere fact of failing to initiate is
19 not ineffective assistance. But this lawyer says, yeah, it
20 really was. I should have done it and I've done it every time
21 sense.

22 MS. KAHN: Of course, his co-counsel didn't come in
23 and provide the same thing --

24 THE COURT: Well, he'll say the same thing. That's
25 really again -- let me go back to my issue. I'm trying to

1 figure out what a hearing would look like. How much more meat
2 gets onto this claim in an evidentiary hearing that I don't have
3 now.

4 Lawlor comes in or -- and they are decent lawyers. I
5 have no quarrel with either of them, but they -- I don't know
6 how much you embellish. I mean, maybe you call Flood and he
7 says, oh, yeah, if I had known, I would have definitely pled to
8 cooperate. He says that now, hasn't said it in his affidavit.

9 Now, for me -- first of all, you know, hearings and
10 that's certainly what this argument today is about. This is not
11 the hearing so much, is to whether we should have a hearing
12 particularly on that one point. They're not the norm, they're
13 extraordinary. And right now there has to be some disputed
14 material fact. I'm not sure there's any disputed material fact
15 here. There has to be --

16 Well, there are credibility issues which would open
17 up, I guess, at trial and it would take the form of a far more
18 expansive statement about, quote-unquote, what happened than I
19 have now on the request for holding a hearing, which is just a
20 colorable claim. So, I'm dealing with those issues about
21 whether, frankly, there should be a hearing at all to go forward
22 on this. That's really the essence of where we are on this
23 argument today or whether it can be decided on the papers.

24 MS. WILKINSON: I would submit that it can, Your
25 Honor. The government is telling the Court to accept as true

1 that it happened as Mr. Lawyer said it did, accept that as true.

2 THE COURT: Well, I don't know what Lawlor is going to
3 say at a hearing though. That's what I'm concerned about, not
4 through any sense of deliberate misrepresentation to the Court,
5 but these claims have a way of --

6 The way a witness at trial ends up remembering a lot
7 more at trial than they told you before trial, I just wonder.
8 And same with Flood, he remembers a lot more now about what he
9 would have done. Certainly, he probably says, he would say, I
10 would have cooperated if it would have cut my sentence in half.
11 Well, sure, we hear that all the time from people who regret not
12 pleading.

13 MS. WILKINSON: Or not cooperating.

14 THE COURT: Or not cooperating. I mean, that's a
15 fairly common argument.

16 MS. WILKINSON: Well, and I certainly don't think it's
17 fair now when Mr. Flood has already filed his affidavit setting
18 forth what his position is. He never puts in here his
19 willingness to accept responsibility and plead guilty in this
20 case. What he's saying is, I hope -- I just didn't want to get
21 a life sentence. He doesn't even say that he did it. You know,
22 he doesn't put in here, I would have accepted responsibility, I
23 would have proffered, I would have cooperated, I was willing to
24 testify, I was willing to do all these things.

25 And he certainly knows when he's filing the affidavit

1 that that's the issue in the case is that Mr. Lawlor is saying
2 he didn't relate that information to him, nor did he come
3 earlier and ask for a plea.

4 And, Your Honor, I have to also say, like, Mr. Flood
5 was not a stranger to the criminal justice system either. And
6 the idea that a defendant wouldn't say, hey, you know, I'm ready
7 to plead guilty and accept responsibility for this, that that
8 would happen, he doesn't say that here either.

9 He never says, I told my attorney, go get a plea --
10 you know, ask for a plea. I mean, it's just common sense that
11 if that's the way you want to go, you would say that in here.
12 And that's what's missing in here. This is just Mr. Lawlor
13 saying, hey, I know now. I'm going to go ask for a plea in ever
14 case.

15 And you know what, I can't imagine that's true either.
16 There are circumstances where a defense attorney would never ask
17 the government for a plea agreement, they just wouldn't.

18 THE COURT: All right. Ms. Kahn, anything further you
19 want to say on that point?

20 MS. KAHN: Yes, please, Your Honor.

21 Respectfully, there are no circumstances in which your
22 client is facing mandatory life at trial and the evidence is
23 very strong, and you do nothing to try to avoid that outcome.
24 That's very different than not going to the government where
25 there's five years on the table for whatever reason. It's

1 qualitatively different.

2 And if we want to not make the claim so broad that
3 every time you don't seek a plea offer, you're per se
4 ineffective, you are when there's mandatory life on the table
5 and the Fourth Circuit has said as much. It's unpublished, but
6 they said it in *United States versus Pender*, 514 Fed Appendix
7 359.

8 Now, in that case, it was factually distinguishable
9 because the government conceded we would have offered him
10 something, which they're not doing here, but that raises the
11 point about the hearing.

12 The Court has heard a lot of testimony today from
13 Ms. Wilkinson about what she would have offered and why she
14 wouldn't have offered it, and her experience with other people
15 not seeking pleas. And that's all testimony that needs to be
16 done at a hearing and I don't think the Court can rule on the
17 papers based on those unsworn statements as true as they may be.
18 That's just the way the law is.

19 And I just want to clarify one more point.
20 Ms. Wilkinson is very adamant that Mr. Flood had to say at this
21 point, I was guilty, I did it, I would cooperated. He doesn't
22 have to say he would have cooperated. Maybe in Ms. Wilkinson's
23 practice that's a requirement for a plea, but it's not always a
24 requirement for a plea.

25 So when he's filing his affidavit, he didn't know

1 about the government's various requirements. He said, I was
2 amenable to a plea. Now, whether that had conditions on it,
3 that can be established at a hearing, but he is under no
4 affirmative obligation to say that in his affidavit.

5 THE COURT: Well, the question, though, is whether I
6 can decide as a matter of law, because I think you're making the
7 argument, that the failure of defense counsel to seek plea
8 discussions is generically, constitutionally defective. Or now
9 that you've refined it somewhat, in cases involving possible
10 life sentences, it's constitutionally ineffective. I mean,
11 that's on the table right now. I don't know what more testimony
12 from Ms. Wilkinson or Mr. Flood or Mr. Lawlor adds to that
13 concern.

14 I mean, I'm concerned about whether I'm prepared to
15 say, because I don't think any court has said yet, that the mere
16 failure of defense counsel to initiate plea discussions is
17 constitutionally ineffective and that's the main argument you're
18 making or to try and circumscribe and say, okay, only in life,
19 possible life sentences or very serious crimes. I mean, these
20 are large propositions to float.

21 And the second concern and you can address this. Yes,
22 we ought to have a hearing. And there's some language in the
23 Fourth Circuit, yeah, hearings are good in certain kinds of
24 circumstances, but hard for me to find an organizing principle
25 that would say in future cases, you don't have a hearing if the

1 issue is counsel never pursued plea discussions.

2 And here what Ms. Wilkinson is saying, it's maybe her
3 experience and just a matter of informing the Court that this is
4 the way life is out there, but there certainly are circumstances
5 because I'm not involved in them that defense counsel don't ask
6 for plea discussions, don't pursue them.

7 MS. WILKINSON: One would be, Your Honor, where their
8 client is maintaining his innocence.

9 THE COURT: I don't have that experience, but if
10 that's the statement, maybe we need to get a supplemental
11 affidavit from the government that says, this is the way it is
12 and here is why. But to hold a hearing is a major step that
13 involves bringing in this defendant years after the fact to say
14 whatever he may say now. I mean, right now he's sort of got a
15 menu of things he can say.

16 What if he goes way beyond what he said in his
17 affidavit? What am I going to do with that? Say, well, okay,
18 it's what he says, but he didn't say it in order to try and get
19 the -- he didn't use magic words, even if he conceivably could,
20 to get the hearing. And now at the hearing, he says a lot more;
21 same with Lawlor and McKenna.

22 There's a principle here about whether hearings --
23 when -- whether hearings should be given at all. We know they
24 are, but under what circumstances and is this one of those
25 situations, and I need to wrestle with this.

1 I understand your argument, the -- it's why we left
2 this claim really for last, because it's a little more texture
3 to it than I think, perhaps, some of the others, but we'll deal
4 with that as well.

5 So, I'm going to write an opinion on this. Maybe one
6 of the last ones I squeeze out of Julie, I don't know, or most
7 of it. We're pretty far along, but I really need to think about
8 this, this last point. And I may -- I may call for -- if I'm
9 really concerned about whether we should have a hearing, we may
10 need a supplemental affidavit from the government about
11 situations in which counsel do not seek plea discussions for
12 what kinds of circumstances and deal with that, because I think
13 that -- you may have to decide this case more generically than
14 specifically. I'm not sure that it's the kind of decision where
15 the Court would say, at least only in all circumstances it has
16 to be sought or -- talking about the Fourth Circuit -- or only
17 in certain limited circumstances plea discussions have to be
18 sought.

19 Those are large propositions and I don't get -- I
20 don't know now yet whether I'm prepared to say that a hearing is
21 the place to resolve all of this. Maybe just an affidavit about
22 what those circumstances about, as I say, when plea discussions
23 are not pursued by defendant and why.

24 Anyway, under advisement. We'll let you know. We
25 have -- Mr. Flood is in custody for some considerable time at

1 this point, so we're not losing much.

2 All right. Anything further then this morning?

3 MS. KAHN: No, thank you, Your Honor.

4 MS. WILKINSON: Thank you, Your Honor.

5 THE COURT: Let me actually -- let me not wait and see
6 how I come out. Why don't I ask for this from the government
7 now, because I won't get an opinion written that quick and you
8 can also respond, Ms. Kahn, if you will, but I would like an
9 affidavit from the government about the circumstances in which
10 counsel have not sought plea discussions; what frequency, what
11 kinds of case, what reasons. And that would be helpful to sort
12 of see whether this is somehow inherently constitutionally
13 deficient. I mean, maybe that's what we come to.

14 MS. WILKINSON: Your Honor, and the way I'm hearing
15 the Court, I don't know that it particularly pertains to me or
16 Ms. Johnston having to do the affidavit, but just generally
17 someone from our office.

18 THE COURT: Somebody from your office needs to say
19 something to give me a kind of a base on how that phase works,
20 because I don't get involved in these discussions that often
21 and, frankly, I'll stay 40 miles away from.

22 MS. WILKINSON: That there are situations where
23 defense counsel do not ask for a plea first.

24 THE COURT: Can you get something in, like, the next
25 20 days.

1 MS. WILKINSON: Certainly, Your Honor.

2 THE COURT: And then you can have time to respond.
3 I'll give you 20 days to file any kind of responsive paper that
4 you want on that.

5 MS. KAHN: Just one question, Your Honor, and I'm just
6 sort of thinking aloud about this. Would that limited to state
7 cases where mandatory life is the consequence of going to trial?

8 THE COURT: If your response is that there are
9 cases -- I don't know if there's too many court cases. There's
10 not that much for it. I didn't find it and we didn't find any
11 decisions that say, the mere fact of failing to initiate
12 discussions is constitutionally ineffective. That's a large
13 proposition you're floating right now.

14 But in terms of practice where what -- what you might
15 say, if you have something to this effect, that there is no
16 known case around the United States or somewhere regionally
17 where a major crime was involved and in every case there was
18 some initiation of plea discussions. However you want to cope
19 with what the government says on that.

20 MS. KAHN: Could I quickly add one more point, Your
21 Honor?

22 THE COURT: Yeah.

23 MS. KAHN: I just want to -- in terms of the Court
24 being concerned about making too broad of a rule. I mean,
25 perhaps it's possible, as the Court pointed out, Mr. Lawlor

1 said, I just missed it. So maybe it's possible that there could
2 be, so Ms. Wilkinson's affidavit will offer various strategies
3 that counsel may rely on not to seek a plea. None of those
4 strategies were offered here by counsel.

5 THE COURT: I asked that question, specifically, if
6 you remember. What if counsel says, oh, I shouldn't have done
7 that and I goofed, and all that? Does that trump in any way?
8 Maybe not, I mean, because you're asking for kind of a generic
9 ruling in all cases where there are no plea discussions or at
10 least in cases with major crimes, there are no plea discussions.
11 This is what the Court should find is constitutionally
12 ineffective. That's what you're arguing.

13 And if I'm deciding those issues, then the specific
14 facts of this case wouldn't necessarily control, even though
15 client -- the lawyer may say, well, this is why I did or didn't
16 do it. I should have, but I never --

17 You know, it never is the case that where the lawyer
18 says, I messed up, that that's enough to carry the day for
19 ineffective assistance. And not because it's a lawyer, you
20 know, fabricating some sort of position necessarily, but it
21 doesn't really -- it's really not analytical in the end. I
22 mean, it doesn't really help you think through these kinds of
23 cases. And you may need a kind of -- when you're making a
24 generic ruling, you need to think of the generic category of
25 cases that are involved. This or any other where there is no

1 initiation of plea discussions, so, but whatever -- however you
2 think you want to come back at it, that's what I'm saying.

3 Take 20 days, Ms. Wilkinson, to come up with your
4 supplemental affidavit. Doesn't have to be from you. Could be
5 from somebody in your office, Ms. Wilkinson.

6 MS. WILKINSON: Yes.

7 THE COURT: And likewise, you come back 20 days after
8 with whatever you have.

9 All right. Anything else?

10 MS. KAHN: No, thank you, sir.

11 THE COURT: Thank you, counsel.

12 (Recess at 11:29 a.m.)

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CERTIFICATE OF COURT REPORTER

I, Linda C. Marshall, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/

Linda C. Marshall, RPR
Official Court Reporter

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